Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1998

W. GLENN BURNS
Petitioner

VERSUS

LARRY D. CROWE, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has the United States Fifth Circuit Court of Appeal decided an important question of Federal law in a way that conflicts with its own jurisprudence and with relevant decisions of this Court:, to wit, that an attorney who is disbarred or suspended from practice is entitled to a lesser degree of due process than one whose sanction is a monetary fine?

2. Should an attorney suspended from practice as a sanction by the District Court and whose sanction has now been reversed by the Appellate Court, have his case remanded to the same trial judge which has already been "tainted" by the lack of due process in the trial Court?

RULE 14(1)(b) LIST OF PARTIES

Petitioner certifies the following list of parties to the proceeding in the Court of Appeals:

Larry D. Crowe (deceased)

Estate of Larry D. Crowe

Sue Ellen Crowe Silman

Succession of Reba Coody Crowe

Robert B. Bieck, Jr.

Attorneys' Liability Assurance Society, Inc.

Michael P. Tone

Anne Fielder

James W. Berry

William E. Wright, Jr.

Judy L. Burnthorn

W. Glenn Burns

American Casualty Company of Reading, PA

CNA

Judge Nauman S. Scott

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PETITION FOR WRIT OF CERTIORARI

W. Glenn Burns ("Burns"), Petitioner herein, respectfully prays for the issuance of a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeal for the Fifth Circuit, entered in this proceeding on August 12, 1998.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeal for the Fifth Circuit giving rise to this Petition, was rendered in the matter of Crowe versus Smith, 151 F.3rd 217 (5th Cir. 1998), reprinted at App. A. By its Order filed December 17, 1998 and reprinted at App. B, the Fifth Circuit denied Burns' and others' "Petition for Panel Rehearing" and "Suggestion for En Banc Rehearing".

The Court's mandate was stayed pending this Petition. (App. C)

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered and filed on August 12, 1998. (App. A). Timely Suggestions for En Banc Rehearing and Petitions for Panel Rehearing were filed by Burns and others but were denied on December 17, 1998. On February 1, 1999, the Fifth Circuit stayed its mandate pending timely applications for writs to this Court (App. C). In accordance with Supreme Court Rule 13.1, this Petition has been

filed within 90 days of the Fifth Circuit's denial of rehearing.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

(1) The Fifth Amendment to the United States Constitution provides:

> No Person shall be … deprived of life, liberty, or property, without due process of law; …

(2) 28 U.S.C. § 455(a) and b(1) provide:

> (a) Any … judge … of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

STATEMENT OF THE CASE

These sanction proceedings grew out of a civil RICO action brought by Larry D. Crowe, et al ("Crowe") against his former partner, the directors of a defunct savings and loan and its former attorneys. Crowe alleged that those parties had, in various ways, cheated him out of his interest in certain real estate. This RICO action, which ultimately gave its name to these proceedings, was instituted in December of 1992 and tried before the Honorable Nauman S. Scott, District Judge, Western District of Louisiana, beginning on July 12, 1994. The Fifth Circuit gives a brief description of the facts of the underlying RICO case at 151 F.3rd 217 (5th Cir. 1998) at page 222.

> "In December 1992, as the latest installment of a long and tangled

> saga of partnership litigation, Larry D. Crowe and the Succession of Reba Coody Crowe (the "Crowes") brought suit against James W. "Sonny" Smith in the Federal District Court for the Western District of Louisiana. The Crowes alleged, among other things, that Smith, who was a former business partner of Larry Crowe, conspired with Peoples Homestead Savings and Loan Association of Monroe, Louisiana, ("Peoples") to defraud the Crowes of their interest in certain commercial agricultural property in violation of RICO. Also made defendants in this suit were Russell Hart, the former president of Peoples, and several of Peoples' former directors and outside attorneys. Eventually, the case was set for trial on July 12, 1994, in Monroe, Louisiana."

In the underlying RICO case, Burns was employed by the malpractice carriers of certain lawyers who could have had only *respondeat superior* liability for any alleged improper conduct of two of their former partners; one who had been a director and officer of the failed savings and loan association, and the

other who was one of its counsel. Since Burns' clients were not charged with any active, individual wrongdoing, and had never been involved directly with the savings and loan association, Burns had a very limited role in the dissents. At the request of the Plaintiff's attorney, Mr. Burns occasionally conveyed settlement offers and responses by and between the Plaintiffs and certain of the Defendants.

Because he had not been involved in the actual litigation to any depth, he was completely unaware of the potential for any directors and officers ("D & O") insurance of the failed savings and loan. His focus was attempting to settle on behalf of his insureds using funds provided by their malpractice carriers.

On the night before trial, July 11, 1994, he met, in the company of other defense attorneys, with Mr. Joe Ward, the Crowes' counsel. They debated the amount of potential coverage afforded the lawyers by their malpractice carriers and Mr. Ward sought a settlement of $6.2 million. Speaking of the malpractice insurance of his clients, Mr. Burns responded that such an offer was "completely beyond any theory of coverage in this case".

Mr. Ward testified that he knew Burns was referring only to his clients' malpractice insurance, and was not mislead by the statement. Thus, he did not join Burns as a sanction-defendant upon his discovery of an old D & O policy insuring the directors of the defunct savings and loan. However, Judge Scott

apparently felt that Burns' comments were evidence that he may have been involved in failing to disclose the existence of a D & O policy which would have been available for settlement of the RICO claims. As a result of this concern, the trial Court *sua sponte* joined Burns as a sanction-Defendant (App. E) and ultimately held that Mr. Burns was involved, with the other defense lawyers, in "hiding" the D & O policy from the Plaintiff. The trial Court imposed sanctions:

(1) $5,000,000.00 against the alleged D & O insurance carrier;

(2) $75,000.00 against one of the D & O carrier's attorneys; and

(3) Various reprimands and suspensions of the other attorneys. Burns was suspended for three months.

In its decision to impose sanctions, the trial Court relied substantially upon Mr. Burns' statement to Crowes' counsel at the July 11, 1994 meeting. But more importantly, Judge Scott appears to have relied heavily on numerous ex parte conversations with Mr. Ward, the Crowes' counsel, who though financially interested in all phases of the case, was appointed as Judge Scott's counsel - i.e. the "prosecutor" of the sanction-defendants. (App. F).

On appeal, the Fifth Circuit reversed the trial Court's imposition of sanctions against Burns on all grounds. However, rather than render its decision as to Burns, it remanded for further consideration by Judge Scott of Mr. Burns' actions at the July 11, 1994 meeting.

Petitioner respectfully, but strongly, suggests that all sanctions should have been dismissed and that the Fifth Circuit's panel erred in remanding the issue to the District Court for the follow reasons:

REASONS FOR ALLOWING THE WRIT

1. The Fifth Circuit's Decision Is Contrary To The Decisions Of The Fifth Circuit and This Court.

A. The Court Held That the Due Process Requirements for Disbarment Were Less Than Those for Monetary Fines:

The Court had little difficulty in finding that the monetary fines imposed on two of the sanction-defendants[1] were criminal in character (Opinion @ App. A, pp. 17-18). Having reached that determination, the Court concluded that the due process requirements of Young

vs. United States Ex Rel. Vuittan et fils S.A., 481 U.S. 787 (1987) were not met by the District Court, since the "prosecutor", Mr. Ward was not disinterested. However, in analyzing the suspensions of Burns, Bieck and Wright, the Court felt that "these sanctions present a very close question" (Opinion @ App. A, p. 21) but then concluded:

> "...we are ultimately persuaded by our clear precedents that they are not so criminal in character as to render the District Court's chosen procedures faulty." (Opinion @ App. A, p. 21)

As to this decision, Judge Garza lodged a very powerful dissent. He noted the punitive characteristics of disbarment or suspension, as recognized by both the U. S. Supreme Court and the Fifth Circuit Court of Appeals:

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1 CNA and Tone

> After a thorough search of the relevant case law, I have found no case in which a district court used procedures like the ones here to impose inherent powers sanctions, let alone where such procedures were upheld on appeal. Particularly where the district court **appoints the interested opposing attorney to prosecute the contempt, engages in secret *ex parte* communications with the attorney, and allows the attorney to testify as a fact witness,** this court errs in condoning the district court's use of inherent *powers*. In the light of these unprecedented and unparalleled procedures, I conclude that the district court failed to provide due process in imposing the disbarment, suspension, and reprimand sanctions. (Emphasis added.) Opinion, @ App. A, pp. 63-64.

In referring to the mandate of International Union, United Mine Workers of America vs. Bagwell, 512 U.S. 821 (1994) Judge Garza stated:

> "…our jurisprudence requires 'progressively greater procedural protection' when sanctions have punitive characteristics (as they do

here) and where the conduct giving rise to the sanctions occurs outside the presence of the Court and requires elaborate fact-finding" (as it did here) (Dissent, Opinion @ App. A, p. 55)

Judge Garza then noted:

"The conduct giving rise to the sanctions stemmed from a series of complicated, out of court, off the record and much disputed events that occurred during settlement negotiations." (Dissent, Opinion @ App. A, pp. 55-56)

One of the primary arguments of all of the sanction-defendants, in urging a fundamental lack of due process, was the use of the Crowes' counsel, Mr. Joe Ward, as a prosecutor and a primary fact witness in the sanction proceedings. The District Court's rationale for the use of Mr. Ward was that (unlike the situation in NASCO[2]), the Court had to have someone investigate and inform it of the facts it

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[2] Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

needed to determine whether sanctions were appropriate. While recognizing the dangers, the majority of the Fifth Circuit's Panel relied on the holding in NASCO to allow the use of an "interested" prosecutor. Judge Garza felt this reasoning to be flawed:

> "The majority attempts to 'escape the mandate of Young', see OP.at 36, by asserting that our decision in NASCO, where we allowed the use of opposing counsel to present evidence on the amount of attorney's fees is 'largely dispositive' with regards to Ward's service as prosecutor. See Op. at 32. I disagree". (Dissent, Opinion @ App. A, p. 58)

Judge Garza noted that the prosecutor in NASCO performed much more limited (and potentially less prejudicial) duties than Mr. Ward did in this case. In the present case, Judge Scott admittedly relied almost totally on Mr. Ward's development of the facts (and

logically, his view and construction of those facts). Thus, Judge Garza stated:

> "Thus, contrary to the majority's conclusion, NASCO cannot be read as support for the District Court's appointment of an interested opposing counsel who simultaneously testifies as a fact witness to the much-disputed out-of-court conduct of which the Judge has no personal knowledge. (Dissent, Opinion @ App. A, p. 59)
>
> … Indeed, if there is any case to which the rule in Young applies, it is this one." (Dissent, Opinion @ App. A, p. 59)

The reasoning expressed in Judge Garza's Dissent is correct: First, at the inception of the sanction proceedings, all of the defendants were potentially at risk for fines or disbarment. Can due process be decided in hindsight, based upon the ultimate outcome, rather than the JEOPARDY to the defendant at the beginning of the proceeding. That is the logical (but erroneous) result of the

Panel's opinion. Second, suspension from practice may be a more serious sanction than a monetary fine. In Re Ruffalo, 390 U.S. 544 (1968). Generally, a lawyer's only livelihood is his practice. If it is ended or interrupted, a substantial monetary penalty ensues. Steadman v. S.E.C., 603 F.2d 1126, 1139 (5th Cir. 1992) Should this potentially more serious outcome be subject to less due process?

In failing to accord full due process (a disinterested "prosecutor" and ultimately, a less than impartial trial judge), the Panel has failed to apply the mandate of Young, Bagwell, *In re* Medrano[3] and NASCO.

B. Remand Will Not Cure the Lack of Due Process:

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[3] *In Re* Medrano, 956 F2d 101 (5th Cir. 1992).

To compound the problem of an interested prosecutor, Judge Scott and Mr. Ward had extensive ex parte communications and defense motions seeking relief from this practice failed. Judge Scott could not, as a human, avoid having his view of the facts colored, in advance of the evidence, by these ex parte communications. It is respectfully submitted that this coloration is revealed in Judge Scott's lengthy and rather passionate Judgment as well as his Suggestion for Rehearing En Banc, at page 5 where he continued to express his strong belief that the settlement was a "cheat" involving "all defense counsel". As a result, Judge Garza was concerned not only with the "overwhelming appearance of impropriety" but the potential "depravation from the lack of a

neutral fact-finder" (Dissent, Opinion @ App. A, p. 63). As to the defendants who are the subject of the remand, it must be respectfully suggested that the risk of a less than neutral fact-finder remains. Thus, a remand to the same fact-finder, who was tainted with the results of these ex parte communications, will only continue to deprive the defendants of due process.

This Court is well aware that the difference between what is and what is not adequate due process cannot easily be demarcated by a bright line. In this case, however, the district court's use of Mr. Ward as a prosecutor, a witness, advisor and confidant, must be recognized as a serious deprivation of due process to the sanction-defendants, regardless of whether their penalty was the payment of

a fine or suspension from practice. Further, this process tainted the tryer of fact.

C. Alternatively, If The Fifth Circuit's Remand Is Allowed, It Should Be Allotted To A Different And Disinterested District Judge.

The record is replete with Judge Scott's lack of neutrality after being involved in improper ex parte conversations with the already interested prosecutor. Because of such violation and pursuant to the Model Code of Judicial Conduct Canon 3(B)(7)(1990), it is not necessary that the sanction-defendants prove Judge Scott's impartiality. 28 U.S.C. § 455(a) and (b)(1). Until this case, the Fifth Circuit seems to have properly enforced this Court's philosophy in Lilgeberg v.

Health Services Acquisition Corp., 486 U.S. 487 (1988) and has itself held that recusal is necessary when there is reasonable cause to question the judge's impartiality, U.S. v. Couch, 896 F.2d 78 (5th Cir. 1990); U.S. v. Jordan, 49 F.3d 152 (5th Cir. 1995); and In Re Faulkner, 856 F.2d 856 (5th Cir. 1988). In his dissent, Judge Garza was concerned with Judge Scott's "overwhelming appearance of impropriety" (Dissent, Opinion @ App. A, p. 61) and for this reason alone, it would be inappropriate for him to consider a remand. The "appearance of impropriety" alone dictates that remand be to another judge. See U. S. v. Jordan, *id.*

CONCLUSION

The United States District Court deprived Burns of the minimum standards of due process. Rather than reversing and rendering the District Court's judgment in its entirety, the Fifth Circuit has remanded one issue back to the trial Court for further consideration of sanctionable conduct. However, even the District Court's attorney-prosecutor, Mr. Ward, admits that no misrepresentation was made by Burns at the meeting made the subject of the remand and that he was not deceived by any comments made by Burns. Thus, there is no further fact-finding required by the District Court, and thus no need for remand.

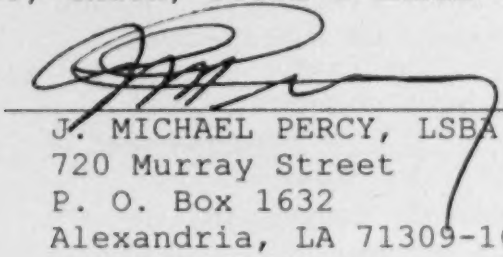
More importantly, the Fifth Circuit erred in holding that disbarment or

suspension does not give rise to the same due process requirements as do monetary fines, and accordingly, failed to reverse and render as to Burns since he had been "only" suspended. Yet, at the outset of his civil prosecution, when due process was most important, he was in the same jeopardy as those who were later fined and whose sanctions were reversed and judgment rendered dismissing the sanction claims against them. The Fifth Circuit should have been consistent in dismissing the sanction claims against Burns rather than remanding one of the claims to the District Court where it found that due process had not been accorded. It is respectfully submitted that if this Court determines to issue a writ, it can summarily reverse and dismiss the remaining sanction claim against Burns as

ample evidence exists in the record therefor. Due process will not be served by a remand to the same forum where it was denied.

Respectfully Submitted,

PERCY, SMITH, FOOTE & GADEL

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing Opposition to Petition for Writ of Certiorari upon:

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by placing same in the United States mail, postage prepaid and properly addressed on this the 11th day of March, 1999.

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